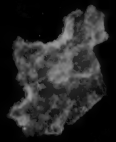

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 758

UNITED STATES OF AMERICA, *Petitioner*

v.

RAYMOND J. RYAN

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 13-16) is reported at —— F.2d ——.

JURISDICTION

The decision and judgment of the court of appeals was filed on May 19, 1970. Petitioner requested and received an extension of time to and including June 29, 1970, for the filing of a petition for rehearing and rehearing *en banc,* and such a petition was filed on June 29, 1970. It was denied on July 29, 1970. Petitioner requested and received an extension of time to and including September 27, 1970, for the filing of

a petition for a writ of certiorari, and the petition was filed on September 26, 1970. Jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an oppressive and imprecise district court order denying respondent's motion to quash a grand jury subpoena duces tecum *and* directing respondent (1) to produce substantially all the "books, records, papers and documents" of two Kenya corporations, (2) to apply to the Registrar of Companies of Kenya for release of these records and, (3) if such application be denied, to make the records "available to agents of the United States Department of Justice and/or the United States Department of the Treasury" for inspection and copying in Kenya is nonappealable under *Cobbledick* v. *United States*, 309 U.S. 323 (1940), as a denial of a motion to quash a grand jury subpoena duces tecum.

STATEMENT

Respondent is a United States citizen who traveled to the United States voluntarily from Kenya, East Africa, to be the principal government witness in a highly celebrated federal criminal trial in 1964, wherein judgments of conviction were affirmed and certiorari was denied by this Court. *United States* v. *Marshall*, 355 F.2d 999 (9th Cir. 1966), certiorari denied, 385 U.S. 815 (1966). As a result of the publicity given him by that trial, respondent and his business ventures became the subjects of a tax investigation by the Internal Revenue Service. Special agents of the Service demanded and were given access to records of the Ryan Oil Company, a domestic partnership belonging to respondent and his wife. Office space was made

available to them, and they inspected the records on the premises for an extended period. (R. Vol. 2, p. 9; R. Vol. 3, p. 4).[1]

Thereafter, the Internal Revenue Service sought to obtain records of companies located in Kenya which they believed to be under the control of respondent. Internal Revenue Service summonses for all or some of such records were served on respondent on November 18, 1966, and, more than a year later, on November 21, 1967 (R. Vol. 1, pp. 27-28, 32-38). Respondent explained in each instance that he could not comply because he did not have custody or control of the books or records, and no enforcement action was taken (R. Vol. 2, pp. 9-10). In addition, federal grand jury subpoenas were served on respondent on July 27, 1967, and August 4, 1967, directing him to testify and to produce certain membership and financial records of Mawingo, Ltd., one of the Kenya companies. Such of the records as were located within the jurisdiction were turned over to Internal Revenue Service agents, who appeared to be acting for the grand jury (*id.* at 10). Respondent's own appearance was deferred.

Respondent was thereafter advised by letter of February 2, 1968, from the Department of Justice to his attorney that he was expected to appear on February 21, 1968, before the federal grand jury pursuant to the subpoena served on August 4, 1967 (R. Vol. 1, p. 29). Respondent returned from Africa for this ap-

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[1] "R. Vol. 1" refers to the documents contained in "Volume One" of the record transmitted to the Court of Appeals. "R. Vol. 2" refers to the Reporter's Transcript of the proceedings on March 5, 1968. "R. Vol. 3" refers to the consecutively paginated Reporter's Transcript of the proceedings of April 9, May 14, July 10, 12 and 15, 1968.

pearance, which was rescheduled at counsel's request for March 5, 1968 (R. Vol. 1, p. 7).

When he appeared on March 5, 1968, his attorney noted that the grand jury which had issued the subpoena in August 1967 had been discharged on September of that year and that the subpoena was, therefore, *functus officio* (R. Vol. 2, pp. 11-12). Government counsel thereupon, in open court, served on the respondent the subpoena which is at issue here and which is reproduced as Appendix A to this brief (pp. 1a, *infra*). He asked that the court issue an order directing respondent to comply with the subpoena, which had a return date of April 15, 1968. The government's motion was denied on the ground that it was premature (R. Vol. 1, pp. 15-16).

Respondent thereafter moved to quash the subpoena on the grounds, *inter alia,* that the records were not in his custody or control, that compliance would be oppressive and unreasonable, and that it would violate the laws of Kenya for him to remove the records from that jurisdiction (R. Vol. 1, pp. 2-21). On July 25, 1968, after several court sessions during which counsel presented legal arguments concerning the validity of the subpoena, the district court ordered respondent to appear before the grand jury on September 11, 1968. The district judge personally directed the defendant as follows in open court (R. Vol. 3, pp. 228-229):

> The order will be also, Mr. Ryan, that you produce with the exception of the books of account, the minute books and list of members before the Grand Jury on September 11, the books, records, papers and documents of Ryan Investments, Ltd. of Nairobi, Kenya and Mawingo, Ltd. of Nanyuki and Nairobi, Kenya, doing business as the Mount Kenya Safari Club. You shall also forthwith make application to the registrar of companies

> in Kenya to release the books of account, minute books and list of members so that you may produce these books, records, papers and documents at the Federal Grand Jury on September 11, 1968. Failing your ability to get the consent of the registrar of companies in Kenya to release such books for presentation you will make available to agents of the United States Department of Justice and/or the United States Department of Treasury the books of account, minute books and list of members of Ryan Investments, Ltd. and Mawingo, Ltd. as set forth above so these agents may inspect and make such copies of these books in Kenya.

A written order generally to the same effect was signed and filed on July 25, 1968 (Pet. 19-20). Respondent's appeal from that order resulted in the decision now sought to be reviewed by the instant petition. The courts of appeals reversed the challenged order of the district court, finding that the order was appealable because it directed "that affirmative action be taken in another country" and thereby "in effect granted a mandatory injunction which, given full effect, would require action by officials of the Kenya Government" (Pet. 14).

Considering the merits, the court below recognized that appellant had presented "several important contentions . . . including persuasive arguments grounded in constitutional law"[2] (Pet. 13). Without reaching these broader claims, the court found the order invalid on the grounds that it lacked particularity and was oppressive in scope (Pet. 15).

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[2] Respondent had challenged the validity of the subpoena under the Fourth and Fifth Amendments and had maintained that he was immune from service of process when he was served with the subpoena. These contentions were in addition to the arguments enumerated above—i.e., that the subpoena was oppressive and that it required respondent to violate foreign law.

ARGUMENT

1. Without seriously challenging the conclusion reached by the court below as to the lack of particularity and patent oppressiveness of the district court's production order,[3] the government urges this Court to grant certiorari in order to hold that respondent must stand trial for contempt before he can obtain appellate reversal of that plainly improper order. Such a course would put this Court to a senseless and fruitless task, particularly since the court below did not purport to establish any novel principle of law or depart in any manner from the established doctrines regarding appealability which have followed *Cobbledick* v. *United States,* 309 U.S. 323 (1940).

How wasteful of this Court's resources it would be if the Court were to give plenary consideration to this case becomes apparent once the consequences of accepting the government's argument are analyzed. If the government is right, the patently defective order of the district court is not presently appealable, but its validity may be considered by a court of appeals only on review of a citation of civil contempt or conviction for criminal contempt. The court of appeals has already held, however, that the constitutional challenges to the validity of the order are "persuasive"

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[3] The only discussion of the merits appears at pp. 8-9, note 8 of the petition, in which it is asserted that since the companies existed "only since 1959 . . . there was no vagueness as to the time period involved." The decision of the court below did not turn on any vagueness as to time. Rather, the court was plainly taken aback by the wholesale nature of an order directing that essentially *all* financial records of two companies be hauled from Kenya and produced before a grand jury.

(Pet. 13) and that the order "is vague and overly broad" (*ibid.*). Accordingly, a reversal by this Court could result only in a citation for contempt which the court of appeals has already found to be based on an invalid order.

2. Nor can it be claimed that the court of appeals has so far departed from this Court's binding decisions that review is now required irrespective of its unfair impact on the respondent and the fruitless nature of a reversal. The court below explicitly recognized and reaffirmed the *Cobbledick* rule which bars premature appellate review of a judicial determination that a grand jury subpoena should not be quashed. Indeed, in its opinion, the court distinguished its recent decision in *Lampman* v. *United States District Court,* 418 F.2d 215 (1969), certiorari denied, 90 S.Ct. 926 (1970)—cited by the court with apparent approval—where it had dismissed an appeal from such an order on the authority of *Cobbledick.* (See Pet. 14-15, and note 1.) Its decision in the present case was based not on any general proposition of law which would undermine all or any significant portion of the *Cobbledick* principle; it was, rather, a decision expressly limited to "the particular circumstances of this case" (Pet. 14). Hence no issue of general importance is presented by the petition, and it does not warrant the time of this Court required for plenary consideration.

3. The government's suggestion that the decision will "invite litigation" is totally unsupported by any facts or statistics regarding the prevalence of orders of the kind involved here. Indeed, the government does not assert that there has ever been a *single* other in-

stance,[4] to its knowledge, of a district court order directing a grand jury witness to make application to an official of a foreign government and, if that application be denied, to take steps on foreign soil to make records available for copying to Justice or Treas-

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[4] There have been some reported cases involving subpoenas of administrative agencies directed to records of domestic corporations which are located abroad. The only case respondent has found in which provisions like those in this case were invoked is *Securities and Exchange Commission* v. *Minas de Artemisa, S.A.*, 150 F.2d 215 (9th Cir. 1945), where the SEC sought judicial enforcement of an agency subpoena directed to a domestic corporation "to produce books and records located in Mexico." 150 F.2d at 216. (The demand was not—as here—for substantially *all* the records of the corporation but only for those pertaining to certain public sales of the corporation's stock.) Reversing a district court order which had dismissed the SEC's application for enforcement, the Ninth Circuit held that the domestic corporation could lawfully be directed to bring the records into the jurisdiction. The court also noted that there had been conflicting testimony in the district court as to whether the law of Mexico would be violated by withdrawal from that jurisdiction of the required records. It then stated that the district court "erred in failing to enter an order" which would have required an application to the Mexican authorities for permission to remove the documents and, if that request were denied, the granting of access to the records to the SEC's staff in Mexico. 150 F.2d at 218-219.

This decision certainly does not support the proposition that such an order is nonappealable. Indeed, under the Securities Act any disposition by the district court in that case would have been reviewable immediately in the court of appeals. See 15 U.S.C. 77v(a), (b); *e.g.*, *Shasta Minerals and Chemical Co.* v. *Securities and Exchange Commission*, 328 F.2d 285 (10th Cir. 1964). Nor does this 25-year-old decision—which has been relied upon and cited for the proposition that an administrative agency may obtain a court order requiring documents to be brought from abroad—warrant the conclusion that orders of the kind entered by the district court are issued so often in the enforcement of grand jury subpoenas that their appealability *vel non* is a recurring legal issue. Respondent has found only two reported decisions in which a question was raised as to the legality under foreign law of complying with a grand jury subpoena duces tecum. In one of

ury Department officials.[5] Yet the import of its petition is that if an appeal is allowed in these peculiar circumstances the floodgates will be opened for delays of other grand jury investigations. We submit that an analysis of such investigations will show that in the overwhelming preponderance of cases—if not in all—motions to quash grand jury subpoenas, if unfavorably acted upon, are simply denied. In the *Lampman* case the Ninth Circuit very recently and most emphatically held that such a decision is not appealable, and there is no real danger, therefore, that legitimate steps taken pursuant to a grand jury investigation would in any manner result in undue interference or delay.

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these cases—*Application of Chase Manhattan Bank*, 192 F.Supp. 817, 191 F.Supp. 206 (S.D.N.Y. 1961)—the district court concluded that the *government* had the obligation of seeking approval of the foreign authorities for permission to have certain documents released. In the other case—*In re Investigation of World Arrangements*, 13 F.R.D. 280 (D.D.C. 1952)—the district judge expressed a willingness to grant an order, on the government's application, which would be modeled after the provisions suggested in *Minas de Artemisa*. There was not the slightest suggestion, however, that such an order would be anything but an independent mandatory injunction, and not part of the disposition of the motions to quash or limit the grand jury subpoena. Hence such an order—which appears never to have been issued—would be appealable under 28 U.S.C. 1292(a). See also *United States* v. *Ross*, 302 F.2d 831 (2d Cir. 1962), where the Second Circuit treated as an appealable interlocutory order under 28 U.S.C. 1292(a) certain judicial directions concerning stock held abroad which were issued pursuant to a jeopardy assessment.

[5] The very inclusion of Treasury Department representatives as possible examiners of the material in Kenya demonstrates how the challenged order differs from a bare denial of a motion to quash a grand jury subpoena. Obviously, if respondent were required to comply with the subpoena's terms only, the documents involved would be seen only by members of the grand jury and attorneys for the government. The challenged order made them available in Kenya to Internal Revenue Service Agents.

4. Moreover, there is a very plain and practical differency between the bare denial of a motion to quash a subpoena (which is not appealable under *Cobbledick*) and the order entered by the district court in this case. As this Court noted in *United States* v. *Bryan,* 339 U.S. 323, 330-331 (1950), quoted in *McPhaul* v. *United States,* 364 U.S. 372, 378 (1960), "[a] court will not imprison a witness for failure to produce documents which he does not have unless he is responsible for their unavailability . . . or is impeding justice by not explaining what happened to them." If respondent's motion to quash had simply been denied, he might have refused to comply and defended against a contempt charge by showing not only that the subpoena was imprecise and oppressive, but also by pointing to the impossibility of compliance without the approval of officials of the government of Kenya. If the government had then chosen to require respondent to take the steps directed by Paragraph III of the district court's order, it would have had to do so by instituting an ancillary proceeding or seeking an order under the All Writs Act, 28 U.S.C. 1651.[6] Such an order separate and apart from the grand jury subpoena, would plainly have been appealable. By consolidating the denial of the motion to quash with the obligations imposed by paragraph III of the order, the government and the district court have attempted to "leapfrog" the appellate review which would have

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[6] Even if the district judge had rejected the defense based upon requirements of Kenya law, he would have been obliged to "consider the feasibility of coercing testimony through the imposition of civil contempt . . . [and could] resort to criminal sanctions only after he determine[d], for good reason, that the civil remedy would be inappropriate." *Shillitani* v. *United States,* 384 U.S. 364, 372 n. 9 (1966). A civil contempt order would, of course, have been appealable.

resulted if proper procedures had been followed. They have now sought to put respondent in the position where he commits criminal contempt if he fails to make the prescribed application to the registrar in Kenya or does not take the alternative steps in Kenya directed by the court order.[7]

This difference between the operative effect of the subpoena, standing alone, and the effect of the order is no inadvertent or minor distinction. In the course of the various proceedings which followed the respondent's appeal from the order of July 25, 1968, and which ultimately resulted in the contempt citation, the district judge made the following observations (Transcript of October 2, 1968, pp. 39-40 *In the Matter of Raymond J. Ryan,* Misc. No. 1926; emphasis added):

> "THE COURT: * * * Here you say that you want an application for an order to show cause as to why he should not be held in contempt for failure to comply with the demands of the subpoena duces tecum.
>
> Well, *it isn't the demands of the subpoena duces tecum that he* [*Ryan*] *was under order to comply* with at the time of the order of the Court. It was certain portions of that subpoena duces tecum, *and the subpoena duces tecum was used by the Court only in terms of reference to certain documents which* were set forth therein, not to the subpoena in its entirety.
>
> * * *
>
> THE COURT: Mr. Ryan is under specific orders of the Court—*not* to comply with the subpoena, but to do certain things, and that was the order of the Court. . . ."

[7] In fact, the district court *did* cite the respondent for criminal contempt, and that proceeding is now pending in the district court—presumably awaiting the outcome of the government's petition in this case. *In the Matter of Raymond J. Ryan,* U.S.D.C. Cent. Dist. Cal., Misc. No. 1926.

5. The only decision cited by the government as allegedly conflicting with the decision below is *In re Grand Jury Investigation of Violations,* 318 F.2d 533 (2d Cir. 1963), certiorari dismissed, 375 U.S. 802 (1963), which is plainly inapposite. In that case, the General Motors Corporation, as the employer of witnesses who had been subpoenaed to appear before a grand jury, requested the district court to issue certain protective orders which would prevent the witnesses' testimony from being used in another pending criminal case against General Motors. When the district court denied the requested relief, General Motors sought to appeal to the Court of Appeals for the Second Circuit, which dismissed the appeal on the authority of *Cobbledick.* There is a plain and obvious distinction between an appeal by a witness or some other party who has unsuccessfully sought in the district court to engraft upon a grand jury subpoena certain extraneous conditions and an appeal by a witness who, at the government's behest, was subjected to obligations in addition to those set forth in the subpoena itself. If appeals were permitted in the first class of cases (typified by the Second Circuit decision) every grand jury witness (or affected third party) could delay his testimony by seeking additional conditions and appealing from the denial of such conditions. But that avenue is not opened by the decision below, which simply permits a subpoenaed witness whom the government and the court have encumbered with added obligations to obtain appellate review of the judicial decree which imposes those new obligations. In those circumstances, the court order falls squarely within the definition of a mandatory injunction given by this Court in *International Longshoreman's Ass'n* v. *Philadelphia Marine Trade Ass'n,*

389 U.S. 64, 75 (1967): "[A]n equitable decree compelling obedience under the threat of contempt. . . ." And the availability of prompt appellate review comes within the policy of 28 U.S.C. 1292(a)(1) rather than within the rule that the enforcement of grand jury subpoenas is nonappealable.

CONCLUSION

The record in this case demonstrates that the Internal Revenue Service has been trying for many years to obtain the record of certain companies in Kenya in the belief that respondent has control over those companies. Using a federal grand jury subpoena as a means of placing respondent under a judicially enforceable order to produce,[8] the government obtained from a district court a wide-ranging order under which respondent is required to take substantial affirmative action abroad to make the documents available to government agents. Having lost in the court of appeals the question whether the order is too imprecise and oppressive to be enforced, the government is now seeking to compel respondent to await a criminal contempt trial before he may assert that infirmity. There is no significant issue of law in this case and no conflict of decisions. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[8] Attempts to obtain judicial enforcement of the IRS summonses would, of course, have been appealable immediately.

APPENDIX

APPENDIX

APPENDIX

Grand Jury Subpoena of March 5, 1968

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Subpoena To Testify Before Grand Jury

To Ray Ryan
Director Mawingo Limited
d/b/a Mt. Kenya Saffari Club
Nanyuki, Kenya

You are hereby commanded to appear in the United States District Court for the Central District of California at 312 N. Spring Street in the city of Los Angeles on the 15 day of April 1968 at 10:00 o'clock A.M. to testify before the Grand Jury and bring with you [1] all books, records, papers, and documents in your possession or under your custody and/or control, either personally or as corporate officer, director, or representative, pertaining to Ryan Investment Limited, Nairobi, Kenya, Mount Kenya Safari Club, Nanyuki and Mairobi, Kenya, Nawingo Limited, Kanyuki and Nairobi, Kenya, and Zimmerman Limited, P. O. Box 2127, Nairobi, Kenya, and Seven-Up Bottling Co. (Kenya) Limited, Nairobi, Kenya, including but not limited to checkbooks, books of accounting, disbursement journals, and any and all correspondence relating to these five entities, as well as records, books, papers, documents and correspondence re-rating in any way to the application of the currency control regulations and the foreign investments protection act

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[1] Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

of Kenya to these five herein described entities, enterprises or corporations.

This subpoena is issued on application of the United States.

JOHN A. CHILDRESS
Clerk

ROBERT J. FOLLIS
Deputy Clerk

Date March 5, 1968

WM. MATTHEW BYRNE, JR., *U. S. Attorney*
312 North Spring Street, Los Angeles, Calif. 90012

RETURN

Received this subpoena at on
and on at I served it on the
within named
by delivering a copy to h

.....
By .....

Date ....., 19....
Service Fees
Travel ..... $
Services ....
Total ..... $